Federal Court  Cour fédérale

Date: 20230412

Docket: T-28-22

Citation: 2023 FC 528

Ottawa, Ontario, April 12, 2023

PRESENT: Justice Andrew D. Little

BETWEEN:

VALERIE ANDRUSZKIEWICZ

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The applicant, Ms Andruszkiewicz, applied for judicial review of a final level grievance decision by the Canada Border Services Agency (the "CBSA") dated August 17, 2020.

[2] Ms Andruszkiewicz raises issues of procedural unfairness and whether the CBSA decision was unreasonable based on *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653.

[3] For the following reasons, the application is dismissed. The applicant has not shown that she was deprived of procedural fairness in either the grievance process or the harassment investigation, and has not demonstrated the final level grievance decision was unreasonable.

I. Events Leading to this Application

A. The applicant

[4] The applicant was employed by the CBSA starting in 1992. As of May 2012, she served as a Supervisor at CBSA's National Targeting Centre in Ottawa.

[5] Ms Andruszkiewicz represented herself in this application.

B. Harassment Complaints and Investigation

[6] In June 2018, the applicant filed a harassment complaint against members of CBSA management, namely a Manager, Director and Director General. By letter dated June 8, 2018, the applicant's legal counsel sent the complaint dated June 1, 2018, to CBSA. The complaint described numerous allegations against the Manager and Director. The applicant claimed that certain incidents had been brought to the attention of the Director General, but resulted in no action.

[7] Also in June 2018, the applicant filed a separate complaint against the Director General. It related to email communications with her about a return to work, sent while she was on long term disability. By letter dated July 9, 2018, the applicant's then-legal counsel set out her position about her complaint against the Director General. By undated letter in response, which I

understand was sent in approximately mid-August 2018, CBSA's Vice President, Operations Branch, advised that the allegations did not fall within the definition of harassment and therefore would not be investigated further.

[8] In late August 2018, Robert Neron of Simner Corporation agreed to serve as an external investigator for the first complaint. The written mandate for the investigation was settled in November 2018.

[9] The investigator interviewed the applicant on December 14, 2018. The interview identified nine events and incidents that would be the subject of investigation. During that interview, the applicant and her counsel confirmed that the Director General was no longer a respondent in the complaint but remained an "important actor" in it. By letter dated December 21, 2018, the investigator advised CBSA that the Director General was no longer a respondent to the applicant's complaint but remained an important actor.

[10] The investigator proceeded to interview the applicant, six other persons who worked at CBSA, as well as the respondent Manager and respondent Director.

[11] The harassment complaints against the Manager and the Director resulted in two Investigation Reports dated June 16, 2019, and June 26, 2019. The Investigation Reports both concluded that the applicant's complaints were unfounded. The investigation found that certain workplace relationships were strained and at times uncivil, but the Manager's and Director's respective conduct did not constitute harassment of the applicant.

[12] CBSA, as the employer, accepted the Investigation Reports and sent decision letters to the applicant dated August 12, 2019 and September 10, 2019 respectively. Those letters confirmed that the employer, having thoroughly reviewed the investigator's findings, supported those findings and accepted that the applicant's allegations were unfounded.

C. The Applicant's Grievance

[13] On October 8, 2019, the applicant filed a grievance "regarding harassment complaint 2018-NHQ-HC-127410" which was the complaint against the Manager and Director. In her grievance, the applicant stated:

- I grieve that Canada Border Services Agency (CBSA) were non-compliant with the Treasury Board Secretariat Policies and Directives on Harassment Prevention and Resolution and the Harassment Complaint Process.
- I grieve that CBSA engaged the services of an external investigator that was non-compliant with the Investigation Guide for the Policy on Harassment Prevention and Resolution and Directive on the Harassment Complaint Process.
- I grieve that evidence provided by myself, including documentation, witnesses, interview and rebuttals to this investigation were not considered in the final decisions of this investigation.
- I grieve that the findings reported by the investigator were unprofessional and biased.
- I grieve that this entire harassment process was mismanaged by CBSA towards myself. I was treated in an unfair manner that deprived me of my pay, my leave, my full mental/physical health and my work reputation.

[14] The applicant requested the following recourse: compensation for lost salary, including holiday, overtime and shift differential pay; a return of her leave used since 2016 when the harassment began; and "an independent, non-commissioned employee of the federal government that will review the findings in their deserved totality".

[15] On January 8, 2020, the applicant met with a Senior Labour Relations Advisor for a consultation about her grievance.

[16] On January 22, 2020, the applicant sent the Senior Labour Relations Advisor a six-page document setting out her grievance allegations in detail and attaching many documents.

[17] The Senior Labour Relations Advisor prepared a Final Level Grievance Précis (the "Précis") and a proposed reply to grievance which were provided for the delegated authority's (decision maker's) consideration. Both were not dated.

II. **CBSA's Final Level Decision**

[18] The final level decision maker (CBSA's Vice-President, Human Resources) rendered a written Reply to Grievance (Final Level) dated August 17, 2020 (the "Reply to Grievance"). The decision maker confirmed having reviewed the circumstances giving rise to the applicant's grievance and that she had taken into account the applicant's points raised at the final level consultation.

[19] The Reply to Grievance stated in part:

> Following the submission of your allegations, formal harassment investigations were launched against two of the respondents you had identified. Allegations against the third respondent were not investigated as they did not fall within the definition of harassment as defined by the Treasury Board's Secretariat's directive governing the harassment complaint process.
>
> The investigations, led by an impartial external manager, both concluded that the allegations raised in your complaints did not meet the definition of harassment and thus, were unfounded. After

> a review of the entire process, I am confident that it was undertaken in accordance with the relevant Treasury Board Secretariat harassment directives and policies and see no reason to intervene.
>
> In view of the foregoing, your grievance is hereby denied. The corrective actions you have requested will not be forthcoming.

[20] The applicant seeks judicial review of the Final Level Decision. Before analyzing her position, I will address certain preliminary issues.

III. **The Applicant's Motions**

A. Motion to Adduce New Evidence

[21] Shortly before the hearing of this judicial review application on October 6, 2022, the applicant filed a notice of motion on September 28, 2022, seeking leave to adduce additional evidence under Rule 312 of the *Federal Courts Rules*. The applicant advised that the additional documentation was minimal and did not include new allegations, but were necessary to respond to points raised in the respondent's record, which was filed on July 22, 2022.

[22] The applicant first advised that she required an amendment to her original affidavit, to clarify that she relied on an additional part in the Treasury Board Directive on the Harassment Complaint Process (in particular, Step 5 found in paragraphs 6.1.1 and 6.1.2). The respondent did not oppose this point. No Order is needed. I will consider it below.

[23] Second, the applicant requested that the record be supplemented to contain the following new materials:

a) a letter sent by CBSA to the Federal Public Service Sector Labour Relations and Employment Board;
b) email communications in January 2020 between the applicant and the Senior Labour Relations Advisor (although the email attached to the applicant's reply filed on October 4, 2022, bears a date in December 2019);
c) two medical letters dated September 21, 2022 and September 29, 2022; and
d) one or two additional pages of a "rebuttal report" prepared by the applicant during the investigation and an email from October 2017 between the applicant and the Director General.

[24] The respondent opposed the admission of these documents because they did not meet the criteria for admission under Rule 312 set out in *Forest Ethics Advocacy Association v National Energy Board*, 2014 FCA 88 and *Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128. The respondent argued that the documents listed immediately above in paragraphs a), c) and d) were not before the decision-maker at the time of the impugned decision (citing *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, at para 19, and *Bernard v Canada (Revenue Agency)*, 2015 FCA 263, at paras 13-18). The respondent further argued that the Court should not exercise its discretion to admit the applicant's email communications in paragraph b) above because it was too late for the respondent to provide meaningful evidence in response.

[25] The applicant filed reply submissions on October 4, 2022, attaching most of the documents at issue and describing further why the additional documents should be admitted, principally because the documents served only to support her existing evidence and position.

[26] During the hearing, the applicant acknowledged the general principle that only materials that were before the decision maker are admissible on this judicial review application.

[27] The test for admission of new evidence under Rule 312 of the *Federal Courts Rules* starts with a determination of whether the evidence is admissible on the application for judicial review and whether the evidence is relevant to an issue properly before the Court: *Forest Ethics*, at paras 4 and 6. Under Rule 312, the Court will also have regard to whether it is in the "interests of justice" to admit the new evidence, including whether it (i) will assist the Court, (ii) will cause substantial or serious prejudice to the respondent, and (iii) was available when the applicant filed the materials for the judicial review application or could have been discovered with the exercise of due diligence: *Tsleil-Waututh Nation*, at para 11. See also *McClintock's Ski School & Pro Shop Inc. v Canada (Attorney General)*, 2021 FC 471, at paras 38-39. In considering whether the evidence will assist the Court, the evidence must be sufficiently probative that it could affect the result: *Holy Alpha and Omega Church of Toronto v Canada (Attorney General)*, 2009 FCA 101, at paras 2 and 11.

[28] Applying these legal principles:

a) the letter sent by CBSA to the Federal Public Service Sector Labour Relations and Employment Board is not admissible. It was included to show CBSA's

"unconcerned" attitude when she requested a medical accommodation and to support the applicant's position of a pattern of procedural unfairness and unprofessionalism Only one undated page of the letter was provided with the motion materials. The proposed new evidence could not materially affect the outcome of this application;

b) the email communications on December 18, 2019 between the applicant and the Senior Labour Relations Advisor during the grievance is admissible as it is relevant to a procedural fairness argument made by the applicant related to the grievance process;

c) the two medical letters dated in September 2022 were tendered to show the mental and physical impact of the harassment complaint on the applicant's life and to support her position that CBSA failed to provide her with medical accommodation on her return to work. However, the reprisal allegation made in the applicant's grievance related to communications in October 2019 concerning her return to work at that time, and did not raise an issue of medical accommodation. The 2022 letters are not admissible as they were not before the decision maker and are not relevant to any proper submission on this application related to the original reprisal allegation;

d) the one or two additional pages of the applicant's "rebuttal report" prepared by the applicant during the investigation could be relevant depending on their contents, but they were not provided on the motion. The applicant provided an excerpt from her email exchange with the Director General on October 17, 2019, which related to her concerns about a comment related to her performance; the

> Director General responded that a meeting with be set up to address her concerns. However, the email could have been provided in her grievance with reasonable diligence, along with all the other documents provided to the Senior Labour Relations Advisor. It is unclear how it could affect the outcome of this application.

[29] The applicant's motion is allowed in part, so that she may make her complete argument concerning Step 5 and to admit the email communications on December 18, 2019, between the applicant and the Senior Labour Relations Advisor.

B. Motion to Submit Post-Hearing Submissions

[30] After the hearing in this Court, the applicant filed a motion seeking leave to file her 55-page "court statement", read at the hearing. The applicant advised that she had been unable to read it completely during her argument. The applicant again referred to Rule 312 concerning the admission of new evidence. The applicant's position was that the oral hearing was scheduled for four hours and she had not been able to speak about the standard of review, which had been raised in the respondent's record. She argued that the respondent and the Court had already heard a majority of the statements, nothing in it had been altered after the hearing and the respondent would suffer no prejudice.

[31] The respondent opposed the proposed filing, on the grounds that the applicant had not met the legal test for accepting new evidence and the Court should not exercise its discretion to receive it.

[32] In my view, the question for this motion does not concern additional evidence to add to the record on this judicial review; it is about additional submissions (argument) after the hearing. The answer is that there was no need for additional legal submissions after the hearing. Both parties had an opportunity to make written submissions beforehand and during the hearing and did so. Both parties knew that the hearing was scheduled for four hours, which implied that each party had approximately two hours to make their submissions. The hearing in fact went about five hours; the applicant's submissions occupied nearly three hours and the respondent's about 1.75 hours, before the applicant's brief reply. No additional submissions were requested or required from the parties. The respondent should not be required to respond in writing to the applicant's court statement (having had an opportunity to respond orally at the hearing). I also reviewed the court statement and determined that its contents concerning the standard of review related to *Vavilov* principles, which are well known to the Court.

[33] Accordingly, the applicant's motion to file her "court statement" will be dismissed, without costs.

IV. **Analysis of the Application for Judicial Review**

[34] At the outset of the legal analysis, it is important to emphasize what is at issue in this judicial review application. The decision under review is the CBSA's Final Level Decision dated August 17, 2020, in the applicant's grievance commenced on October 7, 2019. This application does not review the reasonableness of the decisions to accept the results of the two Investigation Reports, or the substantive contents of those two reports.

[35] This proceeding also does not determine whether the applicant's harassment complaints were valid or not. Further, the Court cannot determine whether the final level decision maker, or the investigator into the harassment complaints, rendered decisions about the harassment complaints that were correct on the evidence.

[36] The applicant's grievance allegations were divided into three broad areas:

a) the investigation was "non-compliant" or did not properly apply the requirements in certain polices and guides published in relation to harassment and the harassment investigation process. The applicant also argued that the investigator was not impartial or was biased;
b) there was "gross mismanagement" of the harassment investigation; and
c) there was misconduct by senior CBSA officials.

[37] The particulars and specific issues arising in the three areas overlapped considerably and were in substance closely related. I say so based on my review of the particulars and issues provided by the applicant to the Senior Labour Relations Advisor during the consultation with the applicant on January 8, 2019, and in her written position provided on January 22, 2020, and my review of the applicant's written and oral submissions to the Court in this proceeding.

[38] In this application, the applicant argued that the Final Level Decision should be set aside because CBSA did not adhere to the principles of procedural fairness and the Final Level Decision was not reasonable. The applicant's arguments about CBSA's conduct, in both the

grievance and the Court, focused on the process used during the harassment investigation, arguing that it did not meet certain requirements established in Treasury Board documents.

A. Reasons for the Impugned Final Level Decision

[39] The reasons for the Final Level Decision in the applicant's grievance include what was stated in the Reply to Grievance itself and the contents of the Précis: *Veillette v Canada (Revenue Agency)*, 2020 FC 544, at para 27.

[40] The respondent submitted that, in law, the two Investigation Reports also formed part of the reasons for the impugned decision (citing *Marszowski v Canada (Attorney General)*, 2015 FC 271, at para 49; *Sketchley v Canada (Attorney General)*, 2005 FCA 404, [2006] 3 FCR 392, at paras 36-39). The respondent submitted that, once accepted, the Investigation Reports became an extension of the agency for which they were prepared and the delegated authority therefore accepted all of their findings. The respondent noted that in this case, the applicant received the two reports, the decision maker had those reports before her when the Final Level Decision was made, and the grievance concerned those reports and the process used to reach their conclusions.

[41] In *Marszowski*, Justice Heneghan stated at paragraph 49:

> Investigation reports are considered an extension of the agency for which they are prepared; see the decision in *Sketchley, supra*. Investigation reports can be considered part of the final decision where the decision references the report; see the decision in *Westbrook v. Canada Revenue Agency*, 2013 FC 951 at paragraph 13.

[42] In *Westbrook v. Canada (National Revenue),* 2013 FC 951, Justice Manson stated at paragraph 13:

> It is not the Court's role to conduct an in-depth analysis of the record to justify the reasons underlying the Agency's decision. That being said, the record here is relatively clear in showing how the Agency arrived at its decision. The initial decision of January 27, 2010, references the Investigator's report and provides a summary of conclusions reached on the evidence. The final decision by the Agency on June 10, 2012, likewise references the Investigator's report. One is not left to guess at the reasons; they are articulated in the January 27, 2010 letter, and supported by the Investigator's report. In the instant application, it is reasonable to treat the Investigator's report and the initial decision as part of the final decision. To sever the final decision from these components would be artificial and contrary to the deference accorded to administrative decision-makers on the reasonableness standard.

[43] In *Sketchley,* the Federal Court of Appeal found that if the Canadian Human Rights Commission adopted an investigator's report and provided no reasons or only brief reasons, the courts had considered the investigator's report as constituting the Commission's reasoning for the purposes of a screening decision: *Sketchley,* at para 37. The Federal Court of Appeal noted that the reviewing Court's decision ultimately remains focused on the screening decision: *Sketchley,* at para 38. See similarly, *Ralph v Canada (Attorney General),* 2010 FCA 257, at para 16.

[44] In this case, CBSA accepted the Investigator's Reports and supported their findings in its letters dated August 12, 2019, and September 10, 2019. The central subject matter of the applicant's grievance was the harassment investigations. The Reply to Grievance and the Précis both referred to the two investigations and their outcomes. The Précis stated that the grievance "contest[ed] the results of the harassment investigations and the way the process was handled by

CBSA". The Précis addressed both issues; on the first, it found that there was no evidence to support the allegation that the investigator was non-compliant with applicable Treasury Board policies governing harassment complaint investigations and no evidence that she was harassed in the workplace by either the Manager or the Director. In substance, the Reply to Grievance and the Précis adopted the Investigator's Reports and found that the investigator's process had followed the required rules, with one exception (the destruction of an interview recording).

[45] In the circumstances, I agree with the respondent that the Investigator's Reports are better viewed as forming part of the reasons for the Final Level Decision, rather than as part of the record on which that decision was based. As in *Westbrook,* it would be artificial to do otherwise.

B. Was the Final Level Grievance Decision Unreasonable?

[46] The standard of review of the Final Level Decision is reasonableness, as described in *Vavilov*. The onus is on the applicant to demonstrate that the decision is unreasonable: *Vavilov,* at paras 75 and 100.

[47] Reasonableness review is a deferential and disciplined evaluation of whether an administrative decision contains the attributes of transparency, intelligibility and justification: *Vavilov,* at paras 12-13 and 15. The starting point is the reasons provided by the decision maker, which are read holistically and contextually, and in conjunction with the record that was before the decision maker. A reasonable decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrained the decision maker: *Vavilov,* esp. at paras 85, 91-97, 103, 105-106 and 194; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, [2019] 4 SCR 900, at paras 2, 28-33, 61.

[48] The Supreme Court in *Vavilov*, at paragraph 101, identified two types of fundamental flaws that may warrant intervention from a reviewing Court: a failure of rationality internal to the reasoning process in the decision; and when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it.

[49] Absent "exceptional circumstances", a reviewing court will not interfere with the decision maker's factual findings and will not reweigh or reassess the evidence: *Vavilov,* at para 125. A reviewing court's ability to intervene arises only if the reviewing court loses confidence in the decision because it was "untenable in light of the relevant factual … constraints" or if the decision maker "fundamentally misapprehended or failed to account for the evidence before it": *Vavilov*, at paras 101, 126 and 194. See also *Canada Post,* at para 61.

[50] Not all errors or concerns about the decision under review will warrant the Court's intervention. To intervene, the Court must find that the identified flaw(s) are more than superficial or peripheral to the merits of the decision, or a "minor misstep". Rather, the problem must be sufficiently central or significant to render the decision unreasonable – there must be "sufficiently serious shortcomings" in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency: *Vavilov*, at para 100.

[51] For the reasons that follow, I have concluded that the applicant has not demonstrated that the Final Level Decision was unreasonable.

[52] While the applicant acknowledged the three hallmarks of reasonableness during her submissions at the hearing, her position was that the Final Level Grievance decision was unreasonable because it should have concluded that the underlying investigation was procedurally unfair and unreasonable because it did not follow certain Treasury Board documents related to harassment investigations and because it was conducted with numerous flaws. The applicant pointed to concerns about competence and sensitivity during the harassment investigation process.

[53] The applicant also sought to link her arguments to CBSA's Code of Conduct and the *Values and Ethics Code for the Public Sector*, referring to principles of respect for democracy, respect for people, integrity, stewardship and excellence. In my view, it is preferable to analyze the applicant's specific arguments in accordance with more concrete and established legal principles, including procedural fairness. See *Burlacu v Canada (Attorney General)*, 2022 FCA 197, at paras 5-6.

[54] The applicant's written submissions did not link her submissions about the underlying investigation with the contents of either the Reply to Grievance or the Précis, nor did her oral submissions until asked by the Court. In response to that question, the applicant referred to her submissions (which made some references to Investigations Reports) and argued that the Reply to Grievance and the Précis did not examine her concerns in detail and were "generic", "dismissive" and "glossed over" her grievances. CBSA's responses to her grievance did not alleviate her concerns about the investigation.

[55] The applicant argued that CBSA erred in law by failing to follow or apply certain (mostly process-oriented) contents of certain documents, namely:

a) Treasury Board Secretariat Policy on Harassment Prevention and Resolution (the "Policy") (which has now been overtaken by the Directive).
b) Treasury Board Directive on the Harassment Complaint Process (also now overtaken by the Directive);
c) Treasury Board Secretariat Investigation Guide for the Policy on Harassment Prevention and Resolution and Directive on the Harassment Complaint Process (the "Guide"), which supported the Policy and the previous directive.

[56] The Reply to Grievance expressly concluded that the investigation was undertaken in accordance with the relevant Treasury Board Secretariat Harassment Directives and Policies.

[57] The Précis quoted the applicant's statements in her original grievance, summarized her position and set out the employer's position. The employer position section of the Précis considered the definition of harassment in the Treasury Board's Policy. The Précis found that the applicant provided no evidence to support her allegation that the investigator was non-compliant with the Treasury Board Secretariat Policies governing harassment complaint investigations, that the investigator was found on Public Service and Procurement Canada's list of available investigators, and the procurement process was followed. At a general level, the applicant has not demonstrated that these conclusions were not open to the decision maker in the Final Level Decision.

[58] The Précis found that no evidence was provided to support that the applicant was harassed in the workplace and noted that the formal investigations by the external investigator concluded that her allegations were unfounded and unsubstantiated. The Précis found that at most, there might be incivility and that there were tensions between the applicant and one of her manager or director in the workplace. The applicant, while disagreeing with the outcome, did not challenge this specific conclusion in the Précis during her submissions.

[59] With respect to the applicant's allegation that the investigation process was flawed and incomplete because the Director General was not interviewed, the Précis noted that the Director General was not a witness to the allegations of harassment, nor was he a respondent. This conclusion was reasonably open to the decision maker on the record.

[60] The Précis addressed the Director General's use of the applicant's personal email address (the subject of the second complaint), finding that the communication was necessary to facilitate her return to work following sick leave and was in the within the scope of a manager's roles and responsibilities. The Précis concluded that it did not contravene the CBSA *Code of Conduct* or the *Privacy Act*, RSC 1985, c. P-21, as alleged by the applicant. In this application, the applicant characterized the Director General's email as insensitive. She noted that it referred to personal health information and was not encrypted, but did not otherwise elaborate on the CBSA *Code of Conduct* or the *Privacy Act*. Despite these concerns, I cannot conclude that the applicant has shown that the decision maker was constrained to reach a different conclusion than the one it did.

[61] The Précis concluded that a letter from the applicant's counsel directing that communications be sent to him was only addressed to its recipient and therefore did not preclude the Director General from contacting the applicant concerning work-related issues outside of her harassment complaint. The Précis found that if that had been intended, her counsel's letter should have stated so more clearly and it was unreasonable for the applicant to expect that the recipient would interpret the request as including any type of communication and to inform others. Reading that correspondence, I find that the conclusion was open to the decision maker.

[62] The Précis found no evidence to support the applicant's allegation that the investigator did not accurately record the comments she made during her interview. The Précis noted that the applicant had the opportunity to review the investigator's notes and make corrections as needed. The applicant did not contest these points.

[63] The Précis addressed in detail the destruction of the audio copy of the applicant's interview. The Précis recognized that the Guide contemplated that use of video or audio recording devices was not advisable and that an investigator must be prepared to provide, upon request, copies of these transcripts which can be very costly and time-consuming. However, the Précis also noted that the investigator used the audio recordings only to help him write his notes, which were then reviewed by interviewees to confirm their accuracy. The applicant's then-counsel confirmed that this approach made "abundant sense". The Précis advised that certain follow-up actions would be taken. The Précis concluded that while the Guide discouraged the use of such recordings, and the investigator failed to provide transcripts on request, that did not mean that the investigator was incompetent or that the investigation was invalid. According to

the Précis, the applicant was provided with the opportunity to review the investigator's notes from their accuracy following the interview and her counsel conceded in writing that the reasons for destroying the recordings made sense. On the record, it was clearly open to the decision maker to reach these conclusions related to the applicant's interview.

[64] Overall, it is true that that the Reply to Grievance and the Précis did not expressly address each and every one of the applicant's specific allegations and points. There are several interrelated points that answer that concern. First, the reasons for the Final Level Decision included both those documents and, in this case, the two Investigation Reports which contained considerably more detail that is responsive to the applicant's original complaints and to additional details articulated in her grievance. Second, the decision maker was required to consider all substantive issues raised in the applicant's grievance and provide sufficient reasons to demonstrate that they had been considered. In substance, I find that the main or central points raised in the applicant's grievance were addressed – the investigator's compliance with applicable directives, policies and guides, and the alleged unfairness and mismanagement of the investigation process. In addition, the reasons for the Final Level Decision were not required to address each and every detailed argument or piece of evidence mentioned by the applicant: *Vavilov* at para 91; *Caron v. Canada (Attorney General)*, 2022 FCA 196, at para 45.

[65] In addition, to the extent that the detailed issues raised by the applicant were not expressly analyzed by the decision maker and also relate to procedural fairness, they will be addressed below.

[66] For these reasons, I conclude that the applicant has not demonstrated that the Final Level Grievance Decision was unreasonable.

C. Reprisal Allegation made to the Senior Labour Relations Advisor

[67] The applicant raised an allegation of reprisal in her written position statement sent to the investigator on January 22, 2020. The applicant referred to communications in late October 2019 (after she commenced the grievance) which she believed would have led to her returning to work at a new location and not resuming her former "substantive" position.

[68] As the respondent acknowledged at the hearing, the Reply to Grievance did not expressly address the applicant's allegation of reprisal. The Précis did summarize her position, noting that the applicant had been trying to come back to work and it had been very difficult with local management. The Précis advised that the applicant felt that she was not being treated fairly, was getting no respect and that "they did not want her back". This treatment was in reprisal for the harassment complaint she filed. The "employer position" portion of the Précis did not analyze this aspect of the applicant's position on the grievance.

[69] The applicant's submissions to the Court referred to many legal issues around reprisal; it appears that she made human rights and privacy complaints related to events and communications that would have led to her return to work (which I understand has not yet occurred). The applicant's position in writing was that CBSA had violated several statutes in respect of her return to work. The submissions seemed to focus on CBSA's alleged failure to provide her with medical accommodation (a concern not mentioned in the original reprisal allegation in on January 22, 2020).

[70] The respondent argued that the reprisal issues raised in the applicant's written submissions were not properly before the Court and that that the applicant had an adequate alternative venue for these issues by making a complaint under the *Federal Public Sector Labour Relations Act*, SC 2003, c. 22, paragraphs 190(1)(g) and 186(2)(a)(iii). The respondent also referred to paragraphs 209(1)(b) and 209(1)(c)(iii), and subsection 228(2) of that statute and to subsection 51(6) of the *Public Service Employment Act*, SC 2003, c. 22.

[71] The applicant's oral argument in response to the respondent's position on the *Federal Public Sector Labour Relations Act* provisions was that reprisal was properly before the Court and that some of the provisions (related to discipline and deployment) did not relate to her harassment complaint.

[72] The reasons for the Final Level Decision are not assessed on a standard of perfection: *Vavilov,* at para 91. Indeed, in her submissions to the Court, the applicant did not argue that the original reprisal allegation, raised in the grievance consultation process on January 22, 2020, should be returned for determination or even identify that it had been summarized but not otherwise analyzed in the Final Level Decision. Considering the matters raised in the grievance as a whole, I conclude that the absence of an express analysis of the original reprisal allegation in the Final Level Decision does not raise a concern that is so fundamental to the applicant's grievance or to the overall Final Level Decision, to warrant setting aside that decision: *Vavilov,* at paras 100, 127-128.

D. Alleged Procedural Unfairness

[73] The applicant raised a number of issues related to alleged procedural unfairness. The applicant elaborated on these general points with submissions on specific issues, which I will address below.

(i) Legal Approach to Procedural Fairness Issues

[74] If a procedural fairness question arises on an application for judicial review, the Court determines whether the procedure used by the decision maker was fair, having regard to all of the circumstances including the nature of the substantive rights involved and the consequences for the individual(s) affected. While technically no standard of review applies, the Court's review exercise is akin to correctness: *Hussey v Bell Mobility Inc,* 2022 FCA 95, at para 24; *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship),* 2020 FCA 196, [2021] 1 FCR 271, at para 35; *Canadian Pacific Railway Company v Canada (Attorney General),* 2018 FCA 69, [2019] 1 FCR 121, at paras 54-55.

[75] In other words, the Court must be satisfied the duty of procedural fairness was met: *Rebello v Canada (Justice),* 2023 FCA 67, at para 10; *Koch v Borgatti Estate,* 2022 FCA 201, at para 40 (citing *Lipskaia v Canada (Attorney General),* 2019 FCA 267, at para 14).

[76] One principle of procedural fairness is to "hear the other side" (sometimes known as the *audi alteram partem* principle). For that principle, the ultimate question for procedural fairness is whether the applicant knew the case to meet and had a meaningful opportunity to be heard – a "full and fair" chance to respond: *Canadian Pacific Railway*, at paras 41 and 56; *Taseko Mines*

Limited v Canada (Environment), 2019 FCA 320, at para 50; *Air Canada v Robinson*, 2021 FCA 204, at paras 54, 66; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para 22.

[77] Below, I will consider the case law that implements these broad procedural fairness principles.

(ii) Fairness of the Process Leading to the Decision under Review

[78] The respondent argued that the onus was on the applicant to make out her grievance claims on facts within her knowledge and that the requirements for procedural fairness in the grievance process were low – only to be advised of prejudicial facts. The respondent referred to *Kohlenberg v Canada (Attorney General)*, 2022 FC 906 and *Blois v Canada (Attorney General)*, 2018 FC 354.

[79] In *Kohlenberg v Canada (Attorney General)*, 2022 FC 906, Justice Fothergill held, at paragraph 23:

> The level of procedural fairness owed to an employee in an internal grievance process is at the low end of the spectrum (*De Santis v Canada (Attorney General)*, 2020 FC 723 [*De Santis*] at para 28, citing *Canada (Attorney General) v Allard*, 2018 FCA 85 at para 41). The employee has the right to be informed of any prejudicial facts, and the right to respond to those facts (*De Santis* at para 30).

[80] In *Blois*, Justice Favel found that the intensity of the duty of procedural fairness in a final level grievance falls at the low end of the spectrum and that the applicant had a "meaningful opportunity to participate and be heard in the grievance proceedings": *Blois*, at para 36.

[81] Here, the applicant has not shown any procedural unfairness with respect to the process leading to the decision under review in this application.

[82] The applicant filed a grievance containing six bullet points. She met with the Senior Labour Relations Advisor for a consultation and provided him with a detailed position in writing and supporting documents. The decision maker provided a written decision (the Reply to Grievance, which was supported by the Précis and the Investigation Reports). The applicant did not show any denial of her right to be heard or to participate meaningfully in the grievance process. In addition, the applicant did not identify any information in the Précis that should have been disclosed to her because it was new or unknown and prejudicial to her, or may have required her input or response prior to the Final Level Decision.

[83] In addition, given the extensive materials provided by the applicant to the Senior Labour Relations Advisor (including many documents on January 22, 2020), I am not persuaded that the advisor also had to go through the applicant's entire "labour relations file" in order to deal with the grievance. The email on December 18, 2019 advised her that the Senior Labour Relations Advisor would be in "listening mode" at the consultation, so that the CBSA decision maker could make a decision "based on the consultation and the information on file". In my view, that statement did not give rise to a legitimate expectation requiring the advisor to review all the documents in the applicant's file: see *Canada (Attorney General) v Mavi,* 2011 SCC 30, [2011] 2 SCR 504, at para 68; *Agraira v Canada (Public Safety and Emergency Preparedness),* 2013 SCC 36, [2013] 2 SCR 559, at para 95.

[84] I conclude that there was no procedural unfairness in the grievance process.

(iii) Alleged Procedural Unfairness during the Harassment Investigation

[85] The applicant's position on this application focused on alleged procedural unfairness during the underlying investigation into her harassment allegations. The central subject matter of the applicant's grievance was the alleged unfairness and mishandling of the investigation process.

[86] The respondent submitted that the relevant standard of review for this issue is reasonableness – while recognizing that the decision maker was closely constrained by the legal principles applicable to deciding whether the underlying investigation was procedurally fair, i.e., that the range of reasonable outcomes for the grievance decision's conclusions on this issue was narrow (citing *Burlacu v Attorney General of Canada*, 2021 FC 339, at paras 60-70, aff'd 2022 FCA 197).

[87] I note that the Federal Court of Appeal in *Burlacu* left open the correct standard of review: at para 9.

[88] In my view, the proper approach is for the Court to determine whether the investigation met the requirements for procedural fairness. However, in the present circumstances, the level of deference that could be afforded is practically not material to the analysis, given the applicable case law. I am also conscious of the nature of the applicant's submissions about the underlying investigation, keeping in mind the goal of responsiveness to the applicant's and respondent's

principal submissions in this Court. I note that, while reserving the position on the reasonableness standard of review based on *Burlacu*, the respondent in fact directly responded to the applicant's submissions on alleged procedural unfairness during the investigation.

[89] For the following reasons, I conclude that the applicant has not shown a breach of her right to procedural fairness during the harassment investigation that should have been recognized in, and resulted in action from the employer in, the Final Level Decision.

[90] The key questions on procedural fairness involve "fairness" in the sense understood by Canadian law, according to well-developed and understood principles. Those principles include the right to have a meaningful opportunity to be heard through some level of participation in the process (as the case law and the context require). The legal standard is not "fairness" in an abstract sense (such as what the Court believes was right or wrong), nor is it what would have been advantageous to any one of the complainant/applicant, the respondents or the employer. As will become clearer below, arguments about procedural unfairness do not permit the Court to assume the function of the investigator by revisiting all of the process choices made by the investigator, determining whether the Court would have done the same thing in the same circumstances, and then substituting the Court's view for the investigator's. Procedural fairness is also not about a disagreement with how the investigator weighed the evidence.

[91] In *Baker,* Justice L'Heureux-Dubé discussed the factors to consider when determining the content of the duty of fairness. She stated at paragraph 27:

> Fifth, the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure

> made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: […] While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints: […]

This approach appears to be reflected in the case law describing the Court's approach to assessing procedural fairness of an investigation.

[92] The applicant submitted generally that the procedural fairness obligations owed in this case were high because of the importance of the matter to her (citing *Canada (Attorney General) v Ladouceur,* 2011 FCA 247, at paras 21-22). The applicant raised numerous specific issues, which, according to the applicant, affected the outcome of the investigation. While each of these allegations may be considered on its own merits, the applicant contended that as a group they suggest that the investigation was allegedly not thorough and complete. With respect to a thorough investigation, the applicant's written submissions referred to *Egan v Canada (Attorney General),* 2008 FC 649, at para 26, and *Sanderson v Canada (Attorney General),* 2006 FC 447, at para 71.

[93] The respondent submitted that for procedural fairness, the applicant had to be provided with an "adequate opportunity to establish her allegations": *Thomas v Canada (Attorney General),* 2013 FC 292, at para 75. In that case, Justice Kane concluded that procedural fairness requirements were met because the complainant had an opportunity to make allegations and provide documents. The investigator considered the documents and interviewed witnesses. The complainant provided comments on a preliminary draft of a report (which the investigator

attested she read and revised the report to reflect them where appropriate). The investigator provided a final written report summarizing the information gathered and setting out an analysis and findings with respect to each allegation, along with the original complaint and all the supporting documents provided: see *Thomas,* at paras 72-96.

[94] At the Court hearing, the respondent also submitted that the Court's jurisprudence has confirmed the employer was entitled to rely on conclusions in the Investigation Reports so long as they were not "clearly deficient" and did not miss any "obvious evidence". In addition, the employer is not required to re-review or consider evidence not presented during the grievance even if theoretically available to the employer. The respondent maintained that the grievor must identify errors and the employer can rely on and respond to what the grievor presents.

[95] Procedural fairness concerns arise if an investigation was clearly deficient because the investigator failed to investigate crucial evidence: *Rosianu v Western Logistics Inc.*, 2021 FCA 241, at paras 33-34, 40; *Tahmourpour v Canada (Solicitor General),* 2005 FCA 113, at paras 8-9, 11, 30-35, 40; and *Sketchley*, at paras 114-125 (all of which refer to the principles in *Slattery v Canada (Human Rights Commission),* [1994] 2 FC 574, esp. at pp. 599-606); *Egan*, at paras 17, 21-22; see also *Sanderson,* at paras 60-71. While these cases relate to investigations in a somewhat different legal context (under human rights legislation), I believe they provide a satisfactory proxy for the procedural fairness obligations of the harassment investigation in the applicant's grievance. (In addition, neither party made submissions concerning the application of *Baker* factors to the present circumstances: *Baker,* esp. at paras 22-28.)

[96] While the investigation may be procedurally unfair if it is not thorough as described above, an investigator is not required to "turn over every stone" or conduct a perfect investigation; the standard is a competent investigation: *Tahmourpour,* at para 39; *Slattery,* at pp. 600, 604-605; *Holder v UBS Bank (Canada),* 2019 FC 1597, at para 53; *Demitor v Westcoast Energy Inc. (Spectra Energy Transmission),* 2017 FC 1167, at para 69, aff'd 2019 FCA 114. An investigation can be thorough without being exhaustive: *Choi v Canada (Attorney General),* 2022 FC 265, at para 38; *Desgranges v Canada (Administrative Tribunals Support Services),* 2020 FC 315, at paras 74-75.

[97] An investigation will not be procedurally unfair for due to lack of thoroughness merely because the investigator did not interview every witness proposed by a party: *Rosianu,* at para 33 (citing *Wong v Canada (Public Works and Government Services),* 2018 FCA 101, at para 14); *Shaw v Royal Canadian Mounted Police*, 2013 FC 711, at paras 32-33; *Gosal v Canada (Attorney General),* 2011 FC 570, at para 55; *Slattery,* at p. 605. The Court will consider what information the prospective witness may provide to the investigator: *Rosianu*, at paras 35-40. The ultimate determination of who to interview is a matter for the investigator, not the complainant: *Rosianu*, at paras 33-35.

[98] The investigator is also entitled to control the investigation process, subject only to the requirement of fairness: *Rosianu,* at para 34.

[99] I turn now to the applicant's specific allegations of procedural flaws, which I have grouped by theme for the analysis.

a) Issues Related to Witness Interviews

[100] **Failure to interview all witnesses**: The applicant submitted that the investigator did not interview all of the individuals she identified as witnesses. At her interview in December 2018, the applicant identified witnesses for each of her main complaints. The notes of this interview were approved by the applicant (signed by her counsel on December 20, 2018). As the respondent submitted, the Investigation Reports contained a list of persons interviewed, which confirmed that the investigator interviewed the persons identified during the applicant's interview on December 14, 2018 (with one apparent exception, discussed below).

[101] The applicant's position was that the investigator should have interviewed an additional witness, Ms Garant, and that in failing to do so, the investigator did not implement the Guide, which contemplates that all parties (including witnesses) will cooperate in the process. The respondent submitted that the new witness was only proposed in mid-March 2019, after the investigator had completed interviews with all other witnesses proposed by the applicant. In addition, the respondent argued that it was unnecessary to interview Ms Garant because the investigator had sufficient information to understand the workplace dynamics.

[102] I find no procedural unfairness here. The investigator mentioned Ms Garant in an email to the employer on December 21, 2018, noting that she did not want to participate in the investigation. The employer asked that the investigator not contact her immediately pending certain other discussions. The applicant's counsel raised Ms Garant again in mid-March 2019. Neither party directed me to other events or emails that would explain why she was not interviewed. With respect to potentially relevant information, the applicant advised that Ms

Garant, who was another manager, would have provided another similar example of "differential treatment" of the applicant in the workplace that would be consistent with her position on the grievance.

[103] The applicant also argued that the investigator advised CBSA that he would not interview Ms Garant, but failed to disclose that fact to the applicant's counsel until two months later. The applicant referred to statements in the Policy about timely communications and keeping the involved parties informed about developments. The applicant also argued that in the meantime, the investigator interviewed other witnesses, yet later explained in a preliminary report that it was too late to interview Ms Garant. The applicant did not identify specifically which other witnesses the investigator interviewed after mid-March 2018.

[104] I find that the applicant's concerns about witness interviews do not give rise to procedural unfairness. Ms Garant was not alleged to be present for any of the specific incidents in the applicant's complaint. The information Ms Garant would have apparently provided was not particularly probative to the harassment allegations. In the circumstances, I am unable to conclude that she was a crucial witness for the applicant's complaint or that the investigation was clearly deficient without her participation as a witness: *Rosianu*, at paras 35-40; *Shaw*, at paras 32-33. Ms Garant was not someone who had obviously crucial information: *Wong*, at paras 14, 20-23.

[105] The applicant's position was also that the investigator should have interviewed Ms Summers but did not. The applicant recalled that Ms Summers had told her that one of the

respondents “treated her [the applicant] like crap”. However, it is hard to see how this comment made Ms Summers a crucial witness for the complaint, on its face or when compared with the apparent salience of witnesses’ information in cases such as *Tahmourpour*. While it is theoretically possible that an interview might have yielded some potentially relevant information, or perhaps led to some further information, the failure to pursue such a possibility is insufficient to constitute procedural unfairness.

[106] **Treating different witnesses differently:** The applicant submitted that the investigator treated two witnesses differently, in that one of the “complainant’s witnesses” (Ms Summers) was allowed not to participate, whereas another witness (Mr Shaddock) was forced to participate. This allegation provides an insufficient basis to show procedural unfairness. Without more about what their evidence was or would have been, or some concern about improper reasons for interviewing one but not the other, it is another way of arguing that the investigator did not interview everyone identified by the applicant. I also observe that potential witnesses are not proprietary to a complainant or respondent. They are people to be interviewed by a neutral investigator.

[107] **Conduct of the interviews:** The applicant criticized the investigator for failing to ask certain questions, or kinds of questions, to witnesses and respondents (who she claimed were not asked directly about their harassment); for providing the questions to two persons (including a respondent, the Manager) before their interviews; for conducting interviews by telephone rather than in person; for interviewing the respondents last, not immediately after her as the complainant; and for conducting allegedly rushed interviews of her witnesses in January but not

interviewing the Manager and Director until February and April. The applicant referred to the Guide (which provided that "[u]nder normal circumstances, the facts will be gathered during an onsite investigation; the parties to the dispute and the witnesses will be questioned in-person") and argued that the order of witnesses violated the Policy.

[108] I am not persuaded that any of these concerns, individually or collectively, shows a valid concern about procedural fairness. The content of the questions to pose to a witness or a respondent is a matter for the investigator. The medium of communication, the order of interviews and whether or not to provide the questions in advance are all normally within an investigator's purview in the specific circumstances of an investigation. In my view, for the purposes of procedural fairness, the Court should be slow to second-guess the investigator's choices of this kind, absent (for example) a glaring oversight, or an error that affects the integrity of the investigation or undermines the investigator's central findings (none of which the applicant showed here). While it may be usual and desirable to interview individuals face-to-face, the applicant has not persuaded me that the investigator's use of telephone interviews in this case is a cause for concern about procedural unfairness.

[109] **Use and destruction of an audio recording:** The applicant argued that the investigator erred by recording her interview and then destroyed the recording, contrary to the Guide. She noted that this showed a lack of respect for the policies and for the requirement to keep a complete investigation file.

[110] In my view, this concern does not rise to the level of procedural unfairness in this case. The applicant and her counsel both reviewed and signed off on the interview notes, and her counsel found it was sensible to use a recording to ensure a complainant's concerns were properly documented. The applicant has identified, at most, a technical inconsistency with a policy but has not shown any prejudice to the investigation, given that her counsel signed off on the interview notes and agreed that the recording process was sensible. No remedy is warranted. See *Burlacu*, at para 88, aff'd by the Federal Court of Appeal on this point (2022 FCA 197, at para 9); *Taseko Mines*, at paras 62-64.

b) Issues Related to the Evidence in the Investigation

[111] **Failure to recognize three alleged internal contradictions in Mr Granham's evidence about differential treatment of the applicant and insubordination:** The parties disagreed on whether such contradictions existed. In my view, the existence and assessment of alleged contradictions in a witness's evidence is something for the investigator. A disagreement about a potential finding by the investigator on this basis does not disclose a procedural fairness issue (whether relating to the investigation or alleged bias on the part of the investigator).

[112] **Failure to consider additional evidence:** The applicant submitted that there was additional evidence that the investigator did not consider. She advised that she obtained some of additional documents from an access to information request, the response to which arrived after the Investigation Reports were completed and sent to her.

[113] The respondent noted that, in law, the investigator was not required to comment on every piece of evidence, only the crucial or key evidence – which the investigator did (citing *Vavilov*,

at paras 97, 102-103, 128, and 137; *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 SCR 458, at para 54; *Bergeron v Canada (Attorney General)*, 2015 FCA 160, at para 74).

[114] This circumstance does not raise a procedural fairness issue. The documents from the applicant's access to information request were not before the decision maker and the applicant did not point to evidence that she asked for a delay in the investigation due to pending evidence-gathering efforts.

c) Unresponsiveness Allegations

[115] **Failure to incorporate the applicant's comments on draft reports:** The Investigation Reports advised that the investigator provided a preliminary report to the applicant and CBSA to ensure "procedural fairness". The preliminary report included relevant information and evidence gathered during the investigation, but not an analysis of the evidence and findings. The Investigation Reports stated that the applicant's comments were "duly considered" in the Investigation Reports.

[116] The applicant submitted that her comments were ignored. The respondent argued that she had an opportunity to comment, which is all that was required.

[117] I located and reviewed the documents that the applicant mentioned during her submissions. The applicant's record included two documents entitled "preliminary summary of facts", which I understand were provided by the investigator to the applicant and the

respondents. The two documents had handwritten notes apparently made by the applicant (from their contents, some made before and some after receipt of the two final Investigation Reports). In amongst the two reports in the applicant's record were two documents comprising, in aggregate, 10 pages that contained the applicant's specific comments on the two preliminary summaries of facts, on a paragraph by paragraph basis.

[118] The documents indicate that the applicant had a reasonable opportunity to be heard and specifically, an opportunity to comment on the draft factual parts of the investigator's work, as contemplated by *Thomas*. The investigator declared, at the end of the two Investigation Reports, that he took into account the comments received on the interim (i.e. preliminary) reports into the assessment of this case and into the conclusions presented in the reports.

[119] The applicant argued that the investigator did not take the next step, by incorporating any of her comments or altering the draft reports to reflect her comments. The respondent did not attempt to refute that argument or respond on a point-by-point basis. I spot-checked several of the applicant's proposed changes against the preliminary summary of facts and one of the Investigation Reports. I found that the investigator had in fact incorporated several of the applicant's comments into the Investigation Report.

[120] I appreciate that as a complainant, the applicant has a sense of frustration that none of her comments were apparently not fully incorporated into the Investigation Reports. The purposes of the opportunity to provide comments on a draft factual summary include better accuracy and completeness of fact-finding, leading to more responsive and comprehensive investigations and

overall improved outcomes. That said, I do not believe that procedural fairness requires an investigator *of necessity* to make changes to the draft facts for a report after hearing comments from an affected party. In this case, some of the applicant's specific comments were disagreements with the draft facts. Others were responses to other witnesses' statements. The applicant asked to see additional documents. For procedural fairness purposes, the applicant did not explain why any of her specific (unincorporated) notations were material or mattered to the outcome of the investigation. Absent some demonstration by the applicant of prejudice on this issue, I am unable to conclude that procedural fairness was compromised. Nor can I conclude that the applicant's disagreements or references to other evidence in this case show bias on the part of the investigator.

[121] **Failure to pursue Director General as a respondent**: The applicant's initial complaint included her Manager, Director and the Director General, the latter on the basis that she made him aware of her concerns that the applicant believed were harassment and he took no action in the workplace. As noted above, the role of the Director General in the investigation was addressed during her interview with her counsel. The separate complaint against the Director General in 2018 did not proceed because CBSA decided that the applicant's allegations did not meet the definition of "harassment". That decision was not the subject of any legal proceedings at the time. I see no basis for a procedural fairness concern.

[122] There was some disagreement or confusion during the investigation, in January 2019, about whether the Director General was to be a respondent. It arose in email correspondence between a CBSA Advisor for Harassment Prevention and Resolution, and the applicant's legal

counsel. In that email exchange, CBSA advised that the Director General had to be removed as a respondent on one allegation, and the applicant's counsel advised that the applicant never intended to remove the Director General as a respondent. In the end, CBSA confirmed that it did not consider him a respondent. I note that the applicant's position in this email exchange does not reconcile with the position of the applicant as stated in the interview notes signed only two weeks before, on December 20, 2018.

[123] The applicant made a number of submissions to the Court concerning the Director General's absence from the investigator's work. The respondent noted that the applicant did not specify what information the Director General would have provided to the investigator. Neither party identified any evidence of an explanation why the Director General was not interviewed.

[124] It appears that the Director General was not a witness to any of the events and incidents that formed the basis of the applicant's complaints against the Manager and the Director, although I recognize that one allegation mentioned the Director General as attending a meeting requested by the applicant. While the applicant's counsel characterized the Director General as an "important actor" during her interview, which was reflected in the approved interview notes and not disputed in the investigator's letter to CBSA dated December 21, 2018, the Director General did not feature in the factual narrative or analysis in the Investigations Reports.

[125] In my view, it remained within the investigator's purview to decide whether to interview the Director General in this case, as the investigation proceeded and the investigator interviewed other people and received documents. It may seem unusual not to interview someone

characterized as an “important actor” by the complainant at the outset of the investigation, and later not to provide an explanation as to why the person was not interviewed in the written Investigation Reports. However, the applicant’s submissions and my review of the record in this application have not persuaded me that the investigator’s failure to do so rendered the overall investigation procedurally unfair in this case: *Rosianu*, at paras 33, 35-40; *Shaw*, at paras 32-33.

d) Timeliness

[126] **Failure to Abide by Time Limits:** The applicant submitted that the Treasury Board directive on the Harassment Complaint Process prescribed a 12-month timeframe for harassment investigations, barring extenuating circumstances. The applicant submitted that it was a requirement that the investigation – including 5 separate steps – had to be completed within 12 months and that the decision maker failed to address whether there were “extenuating circumstances” that justified the longer time to complete the investigation. In addition, the applicant submitted that there were no such circumstances.

[127] The respondent referred to *Green v Canada (Aboriginal Affairs and Northern Development)*, 2017 FC 1121, in which the Court considered the same 12 months period in the Directive but concluded that there was no procedural unfairness when an investigation took 27 months.

[128] I agree with Justice McDonald in *Green*, at paragraphs 63-64:

> [63] The Directive states that investigations should “normally” be completed in 12 months, barring “extenuating circumstances.” When decision-makers codify such policies, as here, that codification establishes the basis for procedural fairness (*Potvin v*

> *Canada (Attorney General)*, 2005 FC 391 at para 21). Given that the "extenuating circumstances" proviso is an element of the procedural fairness owed in this circumstance, this language provides some latitude for an investigation to be conducted beyond the 12 months if necessary.
>
> [64] Further, the time frame of 12 months in the Directive is not necessarily determinative of the timeframe required for an investigation. A decision-maker cannot bind herself to the terms of the Directive, thus fettering her discretion to take into account the specific circumstances of a particular case (*Canada (Citizenship and Immigration) v Thamotharem*, 2007 FCA 198).

[129] In that case, the investigation was delayed due to its complexity (particularly on the facts). In the specific circumstances, the length of time it took to complete the investigation and report on the grievance was not unreasonable or a breach of procedural fairness: *Green,* at para 66.

[130] In the present case, the investigation and Final Level Decision took about 15 months, which is longer than the 12 months stated in the Directive. It took from late August to November for the investigator to be appointed and the mandate settled. The investigator acted with reasonable diligence by meeting with the applicant, conducting interviews and preparing two reports within approximately 7 months. It then took 2-3 months for the decision maker to provide the two letters to the applicant that accepted the findings of the Investigation Reports.

[131] The reasons for the Final Level Decision did not refer to any "extenuating circumstances". The Précis expressly noted the applicant's position that the investigation process was not carried out promptly as it took over 12 months to complete. The Précis found that the investigation did take approximately 15 months for completion, which was "not an unreasonable

length of time to be prejudicial" to the applicant. CBSA did not explain in the evidence the time it took to hire and agree to the mandate of the investigator, and to deliver decision letters after receiving the two reports. The applicant also argued that CBSA was not sufficiently responsive to her counsel's requests for updates and concerns about delays during the process.

[132] While the time taken was not justified with reasons or in the respondent's evidence, I do not conclude that the delays beyond 12 months without express explanation amounted to such unfairness that the Court should intervene. In my view, it makes no sense in this case to conclude that the delays in completing the investigation should lead to a remedy that would set aside the final level grievance decision and effectively re-start the whole investigation process over again. That approach strikes me as impractical and disproportionate to the circumstances, given the quoted reasons in *Green* and the conclusions I have reached on the substantive reasonableness of the Final Level Decision and on other procedural fairness issues in these Reasons.

[133] The applicant also submitted that Step 5 in the Treasury Board Directive on the Harassment Complaint Process (restoring the well-being of the workplace) was not implemented, rendering the investigation incomplete. However, the Investigation Reports found no harassment so the fifth step here is, strictly speaking, inapplicable. That is not to say that the workplace did not need some work towards improvement and healing, only that the absence of a completed Step 5 does not support a finding of procedural unfairness.

e) Conclusion on Alleged Procedural Flaws in the Harassment Investigation

[134] For these reasons, I conclude that the applicant has not identified flaws in the harassment investigation that constituted procedural unfairness. The investigation process met the requirements of procedural fairness as identified and described in the cases decided by the Federal Court of Appeal and this Court, and did not violate applicable process requirements for harassment investigations.

E. Alleged Bias of the Investigator

[135] The applicant also alleged bias in the investigation. I will address the alleged bias from two perspectives.

[136] The applicant first alleged bias on the basis that the investigator was compensated by the employer. She referred to the Guide requirement that the investigator must be a neutral third party with no interest or stake in the case or its outcome. She argued that she had no input into the selection of the investigator.

[137] In my view, the mere fact that this employer hired and compensated the investigator does not reveal a bias or lack of impartiality in the context of a workplace investigation. The applicant did not point to any evidence suggesting that the investigator's compensation was in any way tied to the outcome of the investigation or that the investigator had an interest or stake in the outcome. In addition, the applicant could have raised her concerns at the outset when the investigator was hired and did not, despite having legal counsel at the time: *Canadian National*

Railway Company v Canada (Transportation Agency), 2021 FCA 173, at para 68; *Taseko Mines*, at para 47.

[138] Second, in the investigation context, this Court has analyzed alleged bias by determining whether the applicant has shown that the investigator approached the investigation with a closed mind: *Beaulieu v Canada (Attorney General),* 2022 FC 1671, at paras 39-40, 116-117; *Shoan v Canada (Attorney General),* 2016 FC 1003, at paras 46-48; *Abi-Mansour v Canada (Revenue Agency)*, 2015 FC 883, at para 51; *Gosal*, at para 51; *Gerrard v Canada (Attorney General)*, 2010 FC 1152, at para 53; *Sanderson*, at para 75.

[139] I am not persuaded that the evidence discloses a closed mind by the investigator during this investigation. As the respondent observed, the investigator was external to CBSA. The investigator interviewed witnesses and provided reports whose contents do not suggest any partiality to either the applicant or the employer. The reports, at their conclusion, expressly declared that the investigator investigated the complaints in a neutral and open-minded manner.

[140] The applicant argued orally that there was a pattern of behaviour and findings by the investigator that showed bias (which she raised in her grievance), not closed-mindedness. The applicant referred to the destruction of the audio tape of her interview, providing questions to the respondents before their interviews, that the investigator ignored certain comments or incidents (such as “eye-rolling”) and personal comments in the Investigation Reports that, according to the applicant, belittled her (for example, that she exaggerated some of the events). She submitted

that the investigator did not fully consider her testimony or that of Mr Myrah on an issue. Some of these specific allegations have been addressed already in these Reasons.

[141] The cumulative effect of many events or procedural decisions may, in some cases, suggest that the outcome of an investigation became a foregone conclusion or was predetermined: see *Shoan*. However, a party's disagreement with the investigator's findings on the merits does not establish bias or procedural unfairness: *Beaulieu*, at para 117; *Abi-Mansour*, at para 56. Overall, I am far from persuaded that the investigator's actions or findings in the two Investigation Reports disclose an unfair pattern of conduct as alleged by the applicant.

[142] While the applicant objected to a comment in one Investigation Report that she "exaggerated some of the events", I do not find that this comments suggests bias. It is a finding based on the investigator's assessment of the evidence and within an investigator's purview.

[143] I conclude that the applicant has not shown bias in relation to the investigation.

V. **Conclusion**

[144] The application will be dismissed.

[145] The parties agreed at the hearing that the title of proceedings should be amended to indicate that the proper respondent is the Attorney General of Canada.

[146] The respondent has been substantially successful but did not seek costs of the judicial review application. In the exercise of the discretion under Rule 400, there will be no order as to costs.

[147] Finally, I recognize and thank the parties for their work in presenting very detailed written and oral submissions on this application.

JUDGMENT IN T-28-22

1. The title of proceedings is amended, on consent, to state that the respondent is the Attorney General of Canada.

2. The applicant's motion to adduce new evidence is allowed in part, to admit the email communications on December 18, 2018 between the applicant and the Senior Labour Relations Advisor.

3. The applicant's motion to file her "court statement" after the hearing is dismissed.

4. The application for judicial review is dismissed.

5. There is no order as to costs.

"Andrew D. Little"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-28-22
STYLE OF CAUSE:	VALERIE ANDRUSZKIEWICZ v DEPARTMENT OF JUSTICE
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	OCTOBER 6, 2022
ORDER AND REASONS:	A.D. LITTLE J.
DATED:	APRIL 12, 2023

APPEARANCES:

Valerie Andruszkiewicz	SELF-REPRESENTED
Amanda Bergmann	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT